The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRUEBLOOD *et al*. Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES *et al*, Defendants.	NO. C14-1178 MJP DEFENDANTS' RESPONSE TO PLAINTIFFS' THIRD MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs request that this court enjoin the operation of the Yakima facility as well as any other "corrections-based restoration program." Plaintiffs' Proposed Order at 3. This misleading phrase repeatedly used by Plaintiffs to describe the Department's alternate treatment location known as the Yakima County Competency Restoration Program (YCCRP) inaccurately and unfairly characterizes this facility, the closing of which would thwart Defendants' efforts to provide adequate restoration beds by this Court's May 27, 2016 deadline. Plaintiffs' request for emergency injunctive relief is inconsistent with the current posture of the case, lacks a basis in law, and, most importantly, is bad for class members.

This Court should deny the Plaintiffs' request for the extraordinary and drastic remedy of a temporary restraining order (TRO) for at least three reasons. First, the requested

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injunctive relief prohibiting class members from receiving restoration treatment at the YCCRP exceeds the scope of the underlying lawsuit, which, as Plaintiffs have repeatedly informed this Court, is concerned solely with the reduction of class member wait times in county jails. This Court should not allow plaintiffs to raise new claims and litigate the adequacy of treatment conditions post-judgment in the present case.

Second, a TRO is procedurally improper following entry of a final judgment and permanent injunction in this case. A TRO is a provisional form of relief available prior to litigating a case on the merits; Plaintiffs now improperly seek this form of relief *after* entry of a permanent injunction and an order modifying the injunction. If Plaintiffs feel that this Court's April 2, 2015 permanent injunction order has not been complied with, the proper remedy is a contempt proceeding, not to seek what would amount to duplicative injunctive relief under Plaintiffs' reading of this Court's April 2, 2015 permanent injunction order.

Third, even if a TRO could be sought in anticipation of a contempt proceeding, which Plaintiffs have not even requested, Plaintiffs have failed to show that they would be likely to prevail at any such hearing or satisfy any of the other *Winter* factors necessary to support their pending request. This Court should deny Plaintiffs' improper motion for TRO for any and all of these reasons.

I. COUNTER STATEMENT OF FACTS

Plaintiffs go to great lengths to revise history in an effort to mischaracterize the Yakima facility as a "corrections-based restoration program" that provides "substandard treatment." Not only have Plaintiffs failed to provide anything more than hyperbole to support their claims, the record and evidence demonstrates that these claims fail as a matter of fact.

A. Procedural History and Scope of Injunction

More than nineteen months ago, Plaintiffs filed their complaint seeking relief from alleged constitutional violations related to their pre-trial detention. ECF #1, Complaint at 16-18. Throughout the pendency of the case and the trial, Plaintiffs reiterated that they

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challenged only the duration of pre-trial confinement, not the conditions in which class members were held or treated. Trial Exhibit 187, p. 26. After a lengthy trial, this court ruled that substantive due process required evaluation for competency within 7 days of a court order directing that evaluation take place and that where patients were evaluated as incompetent they be admitted for restoration within 7 days. ECF #131, April 2, 2015 Order. An injunction was entered against DSHS requiring the agency to meet those timeframes. Id. Importantly, the order did not restrict competency restoration to the state hospitals. Id. Nor did the order dictate what constituted a therapeutic environment. Id. This is because neither the nature nor sufficiency of the treatment to be provided was ever pled or proved by the Plaintiffs to be inadequate and the issue was not litigated before this Court. For that reason alone, the nature of the program and its operations are outside the scope of the Court's injunction and review. Under prevailing case law, DSHS staff retain the ability to exercise professional judgment to determine how to meet the deadlines imposed by the court. The Department staff in conjunction with its contractors have appropriately exercised that judgment to develop a robust and comprehensive competency restoration program outside the state hospitals that is not corrections-based restoration.

B. Development Of The Yakima County Competency Restoration Program (YCCRP)

Consistent with the agency's long term plan, DSHS identified that it would develop competency restoration beds outside the state hospitals in July 2015. Declaration of Carla Reyes (Reyes Decl.), ¶ 12. After soliciting possible service providers, Comprehensive Mental Health (Comprehensive) from Yakima, Washington was selected to develop a therapeutic competency restoration program there. Declaration of Timothy Hunter (Hunter Decl.) ¶4. Comprehensive has a long history of developing and running successful behavioral health programs in the community as well as working in conjunction with the state hospitals.

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Declaration of Richard Weaver (Weaver Decl.) ¶¶ 2-3, 5. After successfully bidding on a contract with DSHS, Comprehensive has built from the ground up a 24 bed therapeutic competency restoration program which is provisionally licensed by the state Department of Health and falls under the umbrella of Comprehensive's voluntary accreditation by the Joint Commission for Accreditation of Health Care Organizations. Hunter Decl. ¶ 4; Weaver Decl. ¶¶ 7, 11-12. Rather than being a correctional facility, the program is certified as a residential treatment facility (RTF) by the Division of Behavioral and Health Recovery within DSHS. Hunter Decl. ¶ 4.

Like the state hospitals, the RTF is a secure facility because it is charged with the responsibility of safely containing patients who are actively involved with the criminal justice system. Hunter Decl. ¶ 6. However, even though it is located in a secure complex operated by Yakima County that was previously used to house inmates, YCCRP is not a "corrections-based restoration program." Weaver Decl. ¶¶ 8-10; Zolnikov Decl. ¶¶ 10-11; Hunter Decl. ¶¶ 5-7. This is because the unit itself is not located within a corrections facility that is staffed by corrections officers, no inmates are present, the facility's occupants are not subject to corrections policies or oversight and they enjoy freedom of movement. Weaver Decl. ¶¶ 7, 10; Hunter Decl. ¶¶ 5-7. By contrast, jail inmates are typically assigned to a cell and spend a certain amount of hours in a locked cell. Zolnikov Decl. ¶ 10; Weaver Decl. ¶¶ 7, 9. Within the culture of that correctional facility, inmates are subject to correctional policies and procedures, such as use of seclusion and isolation to control behavior and maintain order. Zolnikov Decl. ¶ 10. Instead YCCRP is staffed by trained mental health professionals offering mental health treatment in a therapeutic milieu which is focused on competency restoration. Weaver Decl. ¶¶ 8, 10, 14; Zolnikov Decl. ¶ 11.

C. Changes To The Physical Plant Make YCCRP Safe

The physical plant of the former correctional facility has undergone extensive remodeling to improve the appearance and increase safety for residents. Weaver Decl., ¶¶ 7,

19-20, 35. This work includes assessing ligature risk and making changes to remediate such risk. Weaver Decl. ¶ 20. Anti-ligature work is something that all mental health facilities, including the state hospitals, must continually assess and manage. Weaver Decl. ¶ 20; Declaration of Victoria Roberts (Roberts Decl.) ¶ 4. Additional work to adapt the facility for mental health treatment included, but is not limited to, changing the stairwell, modifying dormitory-style rooms to accommodate fewer people, adding privacy partitions, adding carpet and other wise making the facility more therapeutic and welcoming. Weaver Decl. ¶¶ 7, 19. The architecture, however, is not the key element; rather it is the therapeutic program and approach that is far more important to setting the tone for the program. Zolnikov Decl. ¶ 5; Weaver Decl. ¶ 13; Roberts Decl. ¶ 2.

D. YCCRP Staff And Programming Offer Therapeutic Treatment

YCCRP staff have been trained by forensic restoration staff from Western State Hospital and use the same curriculum for competency restoration as the staff at Western State Hospital. Weaver Decl. ¶ 17; Zolnikov Decl. ¶¶ 6-8. Comprehensive has established a trauma-informed clinical model it uses at YCCRP based on the recognized Sanctuary Model evidence-based practice. Weaver Decl. ¶ 14. All Comprehensive staff, including non-clinical staff such as support staff and janitorial staff, and the staff of the competency-based program, are required to receive this training and to demonstrate competence; they also undergo booster training regularly. Weaver Decl. ¶ 14. In addition, the Yakima program staff have been trained in evidence-based management of assaultive behavior protocols, along with other trainings on things like assessment and management of suicidal behavior, crisis intervention, HIPPAA and client rights, consistent with, and in some ways superior to, training at the state hospitals. Weaver Decl. ¶ 17. The WSH forensic services director remains a resource to YCCRP. Zolnikov Decl. ¶ 9.

In addition to training to get the program up and running, extensive work and planning has been undertaken by Comprehensive and DSHS to develop program manuals related to

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program operation, restoration treatment and to govern ongoing operations. Hunter Decl. ¶¶ 8-10. Among others, YCCRP has policies related to patient rights, mail delivery, securing patient belongings and other aspects related to the residential nature of the facility which are similar to such operations at the state hospital. Weaver Decl. ¶ 11; Zolnikov Decl. ¶¶ 18-19. Access by families and attorneys is also available under comparable terms to that which occurs at the state hospitals. Zolnikov Decl. ¶¶ 14, 16-17; Weaver Decl. ¶¶ 26, 28.

E. YCCRP Is Not A Corrections-Based Restoration Program

Plaintiffs repeatedly refer to YCCRP as a "corrections-based restoration" program demonstrating their continued lack of expertise and sophistication in analyzing clinical matters better left to mental health professionals. Indeed, the only support for their position is a misrepresented and misconstrued citation to a single expert opinion used in an attempt to prop up their position. In 2014, Dr. Neil Gowensmith and his partners provided a report to DSHS regarding its forensic system. Trial Ex. 35. Within that report, Dr. Gowensmith discussed what he referred to as "jail-based restoration programs." Id. at 31. He describes two types of jail-based restoration programs that are categorically different from the program operated at YCCRP. *Id*.

First, he detailed housing formal restoration programs within active and open county jails, typically by setting aside an entire unit within a jail for restoration services. Id. He cited challenges with these programs as limited jail formularies, transportation of defendants, limited adequate mental health care in jail facilities, and significant concerns regarding civil liberties such as freedom of movement and punitive based behavioral controls. Ex. 35, at 31; see also Trial Transcript Vol 6. p. 170-71. Second, he describes jail programs offering temporary restoration services. Ex. 35, at 31. In the second model, restoration services are provided within a jail as a temporary stop-gap measure while the defendant is awaiting placement in a formal restoration setting. Id.

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Speaking in 2014 about these kinds of jail-based programs, neither of which are equivalent to the YCCRP, Dr. Gowensmith stated, "jail-based competency restoration is not a viable option for Washington at this time." Id. at 37. However, Dr. Gowensmith was questioned regarding this opinion at trial and stated that his opinion in 2014 was twofold, that at that time there was not enough data gathered to support such a program in Washington and that the problem with viability was the lack of stakeholder support in 2014 for such a program. Trial Transcript Vol 6, p. 172; Vol 7, p 37-39.

Plaintiffs have relied upon this single, out of context, and later rebutted, statement from Dr. Gowensmith as evidence that "corrections-based restoration" -- which Plaintiffs appear to define as simply hanging a "jail" moniker on a restoration treatment facility -- is not a viable option for Washington State. True "corrections-based competency restoration programs" are distinctly different from what is offered at YCCRP. Zolnikov Decl. ¶ 12. Fundamental distinctions exist including aspects of the physical plant, policies and procedures, staffing and treatment between a correctional setting and YCCRP. Hunter Decl. ¶¶ 5-7; Weaver Decl. ¶¶ 8 10; Zolnikov Decl. ¶¶ 10-11. The evidence in the record, both at trial and now, simply does not support Plaintiffs' assertion that YCCRP amounts to a "corrections-based restoration program."

F. Professionals Are Exercising Clinical And Administrative Judgment To Develop These Alternate Programs

Clinical professionals, administrators and department contractors have exercised significant professional judgment to develop this competency restoration program. Zolnikov Decl. ¶¶ 6-10; Hunter Decl. ¶¶ 4-7; Weaver Decl. ¶¶ 1-3, 7, 17; Reyes Decl., ¶¶ 3-7. They have consulted with the court monitor and her associates, considered their input and responded to or adopted those recommendations. Weaver Decl. ¶ 35; Hunter Decl. ¶ 4. The fiscal year 2016 costs are expected to be $2.2 million to run YCCRP. Reyes Decl., ¶ 14.

Having restoration programs outside the hospital has always been a component of the state's strategy, as memorialized in the long term plan since July 2015, to meet the timeframe of the court's injunction. Reyes Decl., ¶¶ 12-13. The Department has long been upfront about its use of alternative facilities such as Yakima. Beginning with the May 2015 monthly report, the Department mentions the possible use of Maple Lane as an alternative facility for competency restoration. ECF #171, at 83. The references in the reports continue, with additional detail added in the long term plan. ECF #164, at 16. In the long term plan, the Department describes its concern that the planned expansion of state hospital bed capacity will not be sufficient to meet this Court's order and discusses contracting with other entities. Id. In the September report, the Department outlines options to increase bed capacity, noting its plan to move forward with Yakima and holding Maple Lane in reserve. ECF #180, at 168. In her review of the Department's plan to use alternative sites for restoration, the Monitor's August report indicated the need for the Department to make "[c]onsiderable investments in physical plant modifications, staffing, training, and treatment protocols" to ensure a therapeutic competency restoration program. ECF #171, at 39. The Department has made these investments, including incorporating feedback from the Monitor's recommended expert. ECF #180-3, at 23. Having beds outside the hospital became even more critical after the Centers for Medicaid Services actions regarding the hospital in October 2015 resulted in the decision to delay operation of new restoration beds at WSH. Reyes Decl., ¶ 12. Although these beds remain a temporary measure until WSH can reabsorb the capacity. Roberts Decl. ¶ 3. Without the additional beds at YCCRP, DSHS will not meet the May 27, 2016 deadline to comply with the court's injunction. Reyes Decl., ¶ 16.

G. Court's Prior Findings On Jail Environment Contrasted With Therapeutic Environment

The reason the extensive work described above has been undertaken is specifically to respond and meet the requirements of the Court's injunction. This Court has previously found

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that jails are "inherently punitive" and issued detailed findings supporting that conclusion. ECF #131, at 9. This included that "a correctional environment, calibrated to provide safety and order, is incongruous with the particular needs of the mentally ill, and results in people with confirmed or suspected mental illness spending more time in solitary confinement . . . ." Id. Further the court provided explicit detail about the seclusion of mentally ill class members who are placed in solitary confinement not as part of a therapeutic process but instead as punishment or to keep them safe from other inmates. Id. at 10. In addition the court found that class members while in jail are unable to enter or exit their cells freely and are not encouraged to interact with other people. Id. Class members were not receiving the mental health treatment they needed and their conditions worsened as a result. Id. at 11.

These findings are to be contrasted with the findings about the state hospitals then and the evidence about YCCRP available now. At the state hospitals, class members are allowed to move about freely, encouraged to interact with staff and other patients, encouraged to participate in groups and only held in seclusion based on clinical reasons authorized by a psychiatrist and subject to review. Id. at 10. Similarly YCCRP allows patients to move about freely, has treatment groups with which individuals will be encouraged to engage, has seclusion and restraint as well as residential policies similar to the hospitals and offers mental health treatment similar to that provided at the state hospitals offered by trained mental health staff. Weaver Decl. ¶¶ 7, 9-10, 11, 14, 17, 26-28; Zolnikov Decl. ¶¶ 6-8, 9-10, 14, 16-19.

II. ARGUMENT

This Court should deny Plaintiffs' request for TRO because (1) the requested injunctive relief of prohibiting class members from receiving restoration treatment at the YCCRP exceeds the scope of the underlying lawsuit; (2) a TRO is procedurally improper following entry of a final judgment and permanent injunction in this case; and (3) even if a TRO could be sought in anticipation of a contempt proceeding, Plaintiffs have failed to show that they would be likely to prevail at any such hearing or satisfy any of the other *Winter* factors.

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A. Plaintiffs' Requested Injunctive Relief Impermissibly Exceeds The Scope Of Their Lawsuit By Seeking Relief For An Issue Not Pled In The Complaint

The proper scope of this Court's injunctive order is to function as a remedy to the constitutional violations adjudicated in this case. The "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." Missouri v. Jenkins, 515 U.S. 70, 88 (1995) (quoting Milliken v. Bradley, 433 U.S. 267, 281-82 (1977) (Milliken II)). The pleadings must assert specific judicial relief that will cure the alleged injury. Allen v. Wright, 468 U.S. 737, 753 n.19 (1984). The issue before this Court has always been "to provide timely competency evaluation and restoration services to class members." ECF #131, at 1. There has been no dispute about this. Trial Exhibit 187, p. 26. Yet since judgment, Plaintiffs have surreptitiously attempted to litigate a conditions of confinement case without properly pleading, briefing, or putting that issue before this Court.

Whether the due process rights of individuals awaiting competency services in jail have been violated by DSHS was the legal theory that was pled in the amended complaint, ECF #24, at 15-17, is the legal theory that was argued about in countless motions, ECF #34, 41, 87, and is the legal theory about which testimony was taken and evidence was presented at trial. Following trial, this Court determined that the Constitution is violated when class members are left in the custody of jails for more than seven days, where they are subjected to the conditions present in those institutions. ECF 131. The scope of this case does not, nor has it ever, extend to evaluating the adequacy of the settings in which the Department provides restoration treatment. Plaintiffs are not permitted to simply add or change the legal theories of the case after judgment has been rendered.

Plaintiffs attempt to cloak what amounts to a completely new and distinct lawsuit within the confines of this litigation. Plaintiffs ask this Court to expand its declaratory relief to include a statement that class members are entitled to a "therapeutic environment", a term not

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defined by this Court and never litigated within the bounds of this case. A court must find that the prospective relief fits the injury that has been established at trial. Salazar v. Buono, 559 U.S. 700, 718 (2010). Plaintiffs' requested relief of prohibiting class members from receiving restoration treatment at the YCCRP because Plaintiffs believe it does not meet their, yet undefined, definition of "therapeutic," exceeds the scope of the underlying lawsuit and the injuries proved at trial. This Court should not allow plaintiffs to raise new claims and litigate the adequacy of treatment conditions post-judgment.

As described below, a challenge to conditions of confinement or to the constitutional adequacy of any offered treatment by the Department in its restoration programs is a specific legal test that must be based on specific allegations of harm. The legal theories involved with a conditions of confinement case have different elements, different controlling precedent and a different factual basis, none of which were pled in the complaint, developed in discovery or presented at trial. The Court should respect the limits of its role, and instead must permit the Department to exercise discretion within the bounds of the constitutional requirements. Lewis v. Casey, 518 U.S. at 362-63 (citing Bounds v. Smith, 430 U.S. 817, 818-19, 832-33 (1977) (citations omitted)).

B. A Motion For Preliminary Injunctive Relief Is Both Procedurally Improper and Unnecessary Following Entry Of A Permanent Injunction

Plaintiffs claim that "a TRO that arises from a party's contempt of a court order must show that they are likely to succeed on the merits of a contempt motion." ECF 193 at 9. Plaintiffs cite no authority that would allow them to request a TRO following entry of a final judgment and permanent injunction in this case. The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing may be held. Granny Goose Foods, 415 U.S. 439, 94 S. Ct. 1113 (1974); *see also* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1287 (9th Cir. 2006) (recognizing that preliminary injunctions and temporary restraining orders are forms of provisional relief).

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TROs and preliminary injunctions, then, are preliminary, provisional forms of relief available prior to litigating a case on the merits; they are not tools available *after* a full hearing and entry of a permanent injunction that has already identified the full legal obligations of the parties.[1] If Plaintiffs feel that this Court's April 2, 2015 permanent injunction order has not been complied with, the proper remedy is a contempt proceeding, not to seek to enjoin what Plaintiffs claim has already been enjoined under this court's permanent injunction order. Plaintiff's requested TRO is necessarily either duplicative of the existing permanent injunction (and therefore serves no purpose), or else seeks to modify or expand the permanent injunction, which would make Plaintiffs' motion a request to modify the injunction. Either way, this TRO request is inappropriate, and Plaintiffs have not demonstrated that other remedies such as contempt are inadequate to address their concerns in the ordinary course of litigation.

C. Plaintiffs Do Not Meet the Requirements for a Temporary Restraining Order

Even if a TRO could be sought in anticipation of a post-judgment, post-permanent injunction contempt proceeding as Plaintiffs suggest, Plaintiffs have failed to meet their burden for justifying such a request. A preliminary injunction is " 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.' " Lopez v. Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

A plaintiff seeking a preliminary injunction must establish " 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' " *Id.*, (quoting Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008)); *see*

[1] This case was litigated one year ago, has been subject to a court monitor and monthly reporting requirements, and has monthly status hearings scheduled. In contrast, a TRO happens on extremely shortened time, *see* LCR 65, and in this particular instance was filed late at the end of the business week (Thursday, March 17, 2016 at 10:07 p.m.) so as to be particularly disadvantageous to Defendants' ability to fully develop a record and defend itself.

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also Stuhlbarg Intern. Sales Co. v. John D. Brush and Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001) (stating that the "analysis is substantially identical for the injunction and the TRO"). The party requesting injunctive relief bears the burden of making a showing as to all four prongs. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

1. Plaintiffs cannot establish a likelihood of success on the merits under a contempt standard, or the proper *Younberg* standard

Recognizing that the four-pronged *Winter* test for establishing an entitlement to *preliminary* injunctive relief requires a showing of likely success on the merits at some future proceeding, Plaintiffs have shoehorned in the notion that an unrequested contempt proceeding can serve as the ultimate "merits" proceeding by which to measure the *Winter* test. As previously argued, this is a conceptually flawed application for injunctive relief, but even if it were not, Plaintiffs cannot show a likelihood of success at a future contempt proceeding or satisfy the other three *Winter* factors. Each factor will be discussed in turn.

a. Plaintiffs cannot show a likelihood of success at a future contempt proceeding because it cannot establish that the operation of YCCRP violates the court's April 2, 2015 order.

Plaintiffs assert that Defendants could be held in contempt for violating one clause of the Court's April 2, 2015 order: that class members be admitted to state hospitals within seven days, "without sacrificing the therapeutic environment of a psychiatric hospital." ECF #131, at 22:19-20. From these nine words, Plaintiffs claim that the Defendants' current operation of the YCCRP amounts to contempt of this Court's order.

"The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the [non-moving party] violated a specific and definite order of the court." FTC v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir.1999) (quoting Stone v. City & Cnty. of San Francisco, 968 F.2d 850, 856 n. 9 (9th Cir.1992)). The contempt "need not be willful, and there is no good faith exception to the requirement of obedience to a court order." In re Dual–Deck Video Cassette Recorder

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Antitrust Litig., 10 F.3d 693, 695 (9th Cir.1993). "But a person should not be held in contempt if his action appears to be based on a good faith and reasonable interpretation of the court's order." *Id*. (internal formatting and quotation marks omitted). " 'Substantial compliance' with the court order is a defense to civil contempt, and is not vitiated by 'a few technical violations' where every reasonable effort has been made to comply." *Id*. (citing *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 891 (9th Cir.1982)). The party moving for a civil contempt order must show by clear and convincing evidence that the alleged contemnor violated the court's order. *Id*.; United States v. Ayres, 166 F.3d 991, 994 (9th Cir.1999).

Plaintiffs own characterization of the Court order concedes that facilities other than the state hospitals are allowable under the order: "this Court's order that direct Defendants to provide in-patient competency services either in a state psychiatric hospital *or* in an environment that does not compromise the therapeutic nature found in the hospitals," ECF #193, at 11 (emphasis added). Therefore, the sole possible argument for contempt is that YCCRP is not sufficiently therapeutic to satisfy the Court's order. However, the extensive work done in preparing YCCRP demonstrate that the Department has acted in "good faith and [based upon a] reasonable interpretation of the court's order." In re Dual–Deck Video Cassette Recorder Antitrust Litig., 10 F.3d at 695. Plaintiffs' arguments that because the Department has not implemented YCCRP exactly as they wish, or as other treatment professionals suggest might be better, does not carry the burden in proving that YCCRP is not a therapeutic environment in violation of the Court's order.

Further, to succeed, Plaintiffs must establish that the Court's April 2 order is controlling over a facility that did not exist at the time of the order, which was not the subject of the litigation, and was not considered at all by the Court. Plaintiffs make no effort to explain how the order is controlling on this point, when besides the nine words referenced above, the remainder of the order is entirely silent on the therapeutic environment standard Plaintiffs seek to enforce. Plaintiffs resort to contempt law and choose to rely on the ambiguity of the term

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"therapeutic environment" in the Court's order because under the proper and applicable legal standard, the *Youngberg* professional judgment standard, Plaintiffs cannot prevail.

b. Plaintiff's claim also fails on the merits because under the correct constitutional legal standard the Department has exercised professional judgment, satisfying *Youngberg*

Plaintiffs make no attempt to explain how the correct legal standard for adjudicating therapeutic environments can be anything but the constitutional standard set forth in Youngberg v. Romeo, 457 U.S. 307, 324, (1982). The Court's jurisdiction in this matter is derived solely from the presence of a federal question arising under constitutional law. ECF #24, at 2; 28 U.S.C. § 1331; 28 U.S.C. § 1343. Even if Plaintiffs are now allowed to inject a conditions of confinement issue into this litigation post-judgment, the Court is empowered to do no more than enforce what the Constitution requires. Jenkins, 515 U.S. at 88. The "therapeutic environment" language in the Court's order cannot mean more than what is required by the Constitution, because this Court's power is enabled, guided, and limited by, what the Constitution requires of Defendants. Id. Any attempt by Plaintiffs to hold Defendants to any higher standard must fail, and the Department clearly satisfies the *Youngberg* standard.

Persons committed for mental health treatment, including pretrial detainees confined for restoration treatment, have a Fourteenth Amendment due process right to be provided with adequate care and safe confinement conditions. Youngberg, 457 U.S. at 323-5; Ammons v. Washington Dep't of Social & Health Services, 648 F.3d 1020, 1027 (9th Cir. 2011). According to *Youngberg*, the Constitution requires that the Department, in order to protect a pretrial detainee's right to safe conditions and adequate treatment, exercise professional judgment. Youngberg, 457 U.S. at 321-22. This standard is violated only "when the decision [made] by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not

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base the decision on such a judgment." Id. at 323. The Constitution requires only that the treatment be "minimally adequate." Id. at 319.

This *Youngberg* "professional judgment standard" essentially provides that whether an administrator has violated a person's constitutional rights is determined by whether the administrator actually exercised professional judgment. If a Department's clinicians exercised such judgment, even if other professionals disagree with the conclusion, no constitutional violation arises. Id.

Using professional judgment, the Department and Comprehensive staff have developed, and are now operating, a facility that complies with the Court's order and the Constitution. The Supreme Court recognizes that such decisions are best left to those with the requisite knowledge and experience, concluding that "decisions made by the appropriate professional are entitled to a presumption of correctness." Youngberg, 457 U.S. at 324. While Plaintiff puts forth a number of half-true and misleading complaints, none of the information rises to the level of establishing that what is offered violates the constitutional rights of class members, or that the persons in charge of implementing YCCRP failed to exercise professional judgment. This is because Defendants have assembled a robust program that meets the requirements of the Court's injunction to provide restoration in a therapeutic environment within the requisite time period. The program established at YCCRP far exceeds constitutional minimums, and even if other mental health professionals may disagree with certain aspects of the program, Plaintiffs fail to establish that any decision is a substantial departure from professional judgment. The ways in which the Department and Comprehensive Mental Health have ensured that a therapeutic environment has been created at YCCRP are detailed throughout the declarations and supporting attachments. *See e.g.* Weaver Decl.; Zolnikov Decl.; Hunter Decl.; Roberts Decl.; Reyes Decl.

Clinical professionals at both the Department and Comprehensive have worked together to develop policies and manuals that govern YCCRP, and are modeled after and

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reflective of a mental health treatment program. Weaver Decl. ¶ 10; Hunter Decl. ¶¶ 8-10. The program is staffed by mental health professionals, who have been trained in numerous aspects of running a treatment program like the state hospital using the same curriculum as the state hospitals. Zolnikov Decl. ¶¶ 6-7.

YCCRP has received licensure from the Department of Health and accreditation from the Joint Commission. Weaver Decl. ¶¶ 11-12; Hunter Decl. ¶¶ 4, 14. The Department of DOH carefully considered ligature risk and patient safety in its licensure review. Weaver Decl. ¶ 21. Given that the physical plant and program policies were carefully reviewed before DOH authorized YCCRP to open, it cannot be said that those policies and designs are a substantial departure from professional judgment. YCCRP meets applicable regulatory standards, which further establishes that the program falls within the bounds of professional judgment and standards.

Plaintiffs present no expert evidence that the YCCRP program is a substantial departure from professional judgment. This alone must be fatal to their request. Plaintiffs rely exclusively on the comments, suggestions, and concerns set forth by the Court Monitor and the experts she has retained. However, while those treatment professionals may disagree over what is the best way to implement a treatment program such as YCCRP, none of evidence in the record remotely suggests that YCCRP is product of a substantial departure from professional judgment. The deference required to the Department under the professional judgment standard exists for exactly this reason: treatment professionals and courts may disagree about what is the best way to implement a treatment program, but the decisions should be left up to the professionals who are in the best position to exercise professional judgment.

The facts presented by the Department establish that 1) that Defendants are not in contempt of the directive to provide treatment in a therapeutic environment and 2) that Defendant's have exercised professional judgment in the creation and development of the

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program. Accordingly, Plaintiffs will be unable to succeed on the merits of its claim for contempt and so the Plaintiffs' request for a TRO must fail.

2. Denying the TRO Will Not Cause Plaintiffs to Suffer Irreparable Harm.

Plaintiffs argue that YCCRP "poses a real substantial life threatening risk[,]" ECF # 193, at 15, but fail to present sufficient evidence to carry their burden that in the absence of a TRO class members are likely to suffer irreparable harm. The purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits. U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010).

Plaintiffs have failed to establish that class members will suffer irreparable harm by being admitted to the YCCRP. Plaintiffs repeatedly use the word "substandard" and "unsafe" to describe YCCRP, but cite to no evidence to support this assertion. On the contrary, great efforts have been made by the Department and Comprehensive to build a patient-focused, treatment-based, therapeutic environment on par with the state hospitals. Hunter Decl. ¶¶ 4, 7; Weaver Decl. ¶¶ 7, 11, 41, 43. The facility has been renovated to more closely resemble a hospital. Id. ¶ 7. The staff are trained mental health professionals, not correctional. Id. ¶¶ 13, 14, 17. The programming follows the same trauma-informed care of the hospitals. Id. ¶¶ 14, 17, 35. The staff have gone through extensive trainings, even more so that state hospital staff. Weaver Decl. ¶ 14; Zolnikov Decl. ¶¶ 6, 7. Extensive admissions criteria have been developed to ensure only appropriate candidates are admitted to YCCRP. Decl. Zolnikov, ¶ 23.

Plaintiffs also seem to suggest that they succeed on their argument purely because risk of harm exists in an institutional setting. But a likelihood of suffering irreparable harm requires more than demonstrating simply a risk of harm exists. Motions for preliminary injunctive relief require a presentation of evidence showing a likelihood of irreparable harm, and may not rely on mere allegations. See Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc., 736 F.3d 1239, 1251 (9th Cir. 2013) (recognizing that,

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"Those seeking injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm.")

The relevant licensing bodies, including the Washington Department of Health and Joint Commission, which consider safety and ligature risk as part of their licensure standard, have both licensed YCCRP as ready to admit and treat patients. Weaver Decl. ¶ 21. The remote possibility that a patient would not be screened out under the YCCRP admission criteria, escape all observation and monitoring by YCCRP mental health staff, overcome the ligature prevention work that has been performed, and cause harm to themselves, does not rise to the necessary legal standard: a *likelihood* that such an irreparable harm *will* occur. Indeed, the state hospitals themselves are not completely free from risk of harm, but Plaintiffs assert placement within the state hospitals is what they seek. Plaintiffs must show something more than mere allegations of a risk of harm; they must present evidence showing a likelihood the irreparable harm they allege will inevitably occur. They have not done so.

What is most ironic about Plaintiffs allegations of irreparable harm is that the greatest risk to class members is Plaintiffs' request for relief. To halt admissions to YCCRP will certainly harm class members by leaving them in the very environments this Court has found to be so harmful: the jail. ECF #131. There are individual defendants waiting right at this moment for restoration services, who have been assessed as eligible candidates to receive services at YCCRP. Enjoining the Department from admitting them not only would prevent those individual defendants from entering into restoration treatment quickly, but only further depletes the high-demand forensic beds at the state hospitals because that individual still must receive restoration treatment somewhere. The baseless allegation that YCCRP is inadequate and unsafe has zero support in the record, does not rise to the standard required to demonstrate a likelihood of irreparable harm, and Plaintiffs' argument on this point cannot succeed.

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3. The balance of equities weighs in favor of allowing Defendants to reduce wait times by operating the YCCRP.

In exercising their sound discretion, courts of equity should pay particular regard to the public consequences in employing the extraordinary remedy of an injunction. Winter v. Natural Resources Defense Council, Inc. 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The consequences to the public of the requested injunctive relief are significant. It will put an end to the forward progress being made by the Department in meeting the court's deadline of no longer than seven days wait to obtain a restoration bed. Use of a facility like YCCRP was contemplated as part of Defendants long term plan from the outset. Reyes Decl.¶ 12. Considerable thought, planning, development and effort has gone into the development of this program. Its opening relieves pressure on the burdened state hospitals and allows for some class members to escape the harmful environment of city and county jails. ECF #131. Without these beds at YCCRP there will be no near term relief for those on the waitlist, meaning the proposed relief will have negative consequences for all class members. To deny admission of class members to YCCRP would result in other incompetent defendants being delayed in their admissions. Equity requires the Court to pay particular regard to the public consequences, and the public consequences here are severe. The balance of equities tips in favor of allowing the Department to continue to operate this therapeutic alternative to beds at the state hospitals for those who meet the admission criteria, while continuing to develop additional capacity at the state hospitals and alternative facilities for restoration.

4. Plaintiffs' requested TRO would be contrary to the public interest.

"[When] an injunction is asked which will adversely affect a public interest ... the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." Weinberger v. Romero–Barcelo, 456 U.S. 305, 312-13 (1982). In fact, "courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Id., at 312. When

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the public is impacted, it is appropriate to withhold relief, even if postponement is burdensome to the plaintiff. Id., at 312-13.

As discussed above, the proposed relief will have negative consequences for class members. Operation of YCCRP was contemplated as part of Defendants long term plan from the outset. Reyes Decl. ¶ 12. Considerable thought, planning, development and effort has gone into the development of effort at the hospitals, staff at those hospitals, and importantly, the criminal defendant putative class members. Reyes Decl. ¶ 13. The shuttering of YCCRP would negatively impact those already receiving treatment there and would impact those awaiting commitment to state hospital beds. Reyes Decl. ¶ 16. Further, the relief requested offers no benefit to class members other than to offer them more time to languish in city and county jails.

D. Plaintiffs Should Be Required To Post A Bond If This Court Grants Plaintiffs' Motion

Fed. R. Civ. P. 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Although Plaintiffs are correct that the trial court is vested with discretion to determine the amount of the bond or whether to impose a bond requirement at all, Plaintiffs supply absolutely no rationale for why this Court should not require them to post a bond here.

Waiver is not appropriate here because the Department has invested considerable funds in operation of YCCRP. Reyes Decl. ¶ 14. Removing patients from the YCCRP program, while the Department must continue to pay for services not being utilized, will result in a financial loss. This is exactly the purpose of the bond requirement: to ensure that damages sustained by the restrained party under a TRO may be recovered. Because Plaintiffs seek an

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extraordinary remedy, they should not be exempted from the requirements of Fed. R. Civ. P. 65(c).

The trial court's decision regarding whether to require a security under this rule is reviewed for an abuse of discretion. Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999) *supplemented*, 236 F.3d 1115 (9th Cir. 2001). Plaintiffs offer no reason why this Court should not require Plaintiffs to post a security in the amount of at least $84,615.38[2], for the loss of services from YCCRP that Defendants will incur should a court later conclude that Defendants were wrongfully enjoined.

E. The Inadmissible Newspaper Articles Filed With Plaintiffs' Motion Should Be Stricken

Plaintiffs attach multiple newspaper articles to their motion. ECF #194-8 (Cooper Decl., Attach. H.); ECF #194-9 (Cooper Decl., Attach. I); ECF #194-11 (Cooper Decl., Attach. K.). These attachments are inadmissible hearsay. The articles themselves, as well the numerous statements made within the articles by third-party persons, are inadmissible hearsay, and Plaintiffs make no effort to establish that any of the hearsay exceptions are satisfied. Fed. R. Evid. 802; *see also* Fed. R. Evid. 803, 804. Pursuant to LCR 7(g), Defendants request that the newspaper articles be stricken from the record.

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[2] Assuming the TRO will last for the maximum 14 days, this amount represents the cost for two weeks of services provided at YCRRC based on the annual FY 2016 costs for the program.

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III. CONCLUSION

This Court should deny all of the relief requested. The Plaintiffs are not entitled to a TRO.

RESPECTFULLY SUBMITTED this 19th day of March 2016.

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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this _____ day of March 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David Carlson: davidc@dr-wa.org

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this _____ day of March 2016, at Olympia, Washington.

_____
Beverly Cox
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